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ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE FAMILY OF HEMAN SWEATT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Allan Van Fleet
Counsel of Record
Nicholas Grimmer
McDermott Will & Emery LLP
1000 Louisiana, Suite 3900
Houston, Texas 77002-5005
(713) 653-1703
avanfleet@mwe.com

Counsel for Amicus Curiae
Family of Heman Sweatt
Hemella Sweatt-Duplechan, M.D.
James Leonard Sweatt III, M.D.
Heman Marion Sweatt II

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. *SWEATT V. PAINTER* 5

A. Sweatt's Application and Painter's Response 5

B. Sweatt's Many Dimensions 7

C. Sweatt's Suit and the "Basement School" 10

D. The Trial of Intangibles and the Interplay of Ideas 12

E. This Court's Opinions of June 5, 1950 .. 14

II. SWEATT'S LIFE AND LEGACY AFTER *SWEATT V. PAINTER* 17

A. Sweatt at UT 17

B. Sweatt at the Urban League 17

C. Sweatt's Legacy 18

III. SEGREGATION IN TEXAS EDUCATION .. 20

A. A Brief History of Discrimination in Texas Education 20

B. Resegregation of Texas Public Schools .. 24

IV THE LESSONS OF *SWEATT V. PAINTER* . 28

A. The Importance of Diversity 28

B. The Importance of the Individual 32

C. The Importance of Race 35

D. The Importance of Patience 36

CONCLUSION 37

TABLE OF AUTHORITIES

CASES

Adams v. Richardson,
356 F.Supp. 92 (D.D.C.), *modified and aff'd*,
480 F.2d 1159 (D.C. Cir. 1973) 21, 22

Ali v. Fed. Bureau of Prisons,
552 U.S. 214 (2008) 28

Begay v. United States,
553 U.S. 137, 128 S. Ct. 1581 (2008) 28

Brown v. Bd. of Educ. of Topeka,
347 U.S. 483 (1954) 1, 20

Fisher v. Univ. of Texas at Austin,
631 F.3d 213 (5th Cir. 2011) 31

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570 U.S. –, 133 S. Ct. 2411 (2013) 29

Flax v. Potts,
567 F.Supp. 859 (N.D. Tex. 1983) 21

Grutter v. Bollinger,
539 U.S. 306 (2005) 3, 29, 30, 32, 36

Hopwood v. Texas,
861 F. Supp. 551, 554-63 (W.D.Tex. 1994), *rev'd*,
78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S.
1033 (1996) 20, 21, 22, 23, 31

Hopwood v. Texas,
78 F.3d 932, 935-38 (5th Cir.), *cert. denied*, 518
U.S. 1033 (1996) 20, 23

Horne v. Flores,
557 U.S. 433, 129 S. Ct. 2579 (2009) 27

LULAC v. Clements,
999 F.2d 831 (5th Cir. 1993) 20

McLaurin v. Oklahoma State Regents for Higher Educ.,
339 U.S. 637 (1950) 14-17

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,
551 U.S. 701, 803 (2007) ..... *passim*

Plessy v. Ferguson,
163 U.S. 537 (1896) 6, 36

Regents of the Univ. of Cal. v. Bakke,
438 U.S. 265 (1978) 3, 33

Ross v. Houston Indep. Sch. Dist.,
699 F.2d 218 (5th Cir. 1983) 21

Sweatt v. Painter,
210 S.W. 442 (Tex. Civ. App–Austin 1947, writ ref'd) 13

Sweatt v. Painter,
339 U.S. 629 (1950) ..... *passim*

Tasby v. Wright,
713 F.2d 90 (5th Cir. 1983) 21

United States v. Castleman,
572 U.S. –, 134 S. Ct. 1405 (2014) 27, 28

United States v. Fordice,
505 U.S. 717 (1992) 23

Univ. of Tex. Sw. Med. Ctr. v. Nassar,
570 U.S. –, 133 S. Ct. 2517 (2013) 28

Walker v. Tex. Div., Sons of Confederate Veterans, Inc.,
576 U.S. –, 135 S. Ct. 2239 (2015) 27, 34

Women's Equity Action League v. Cavazos,
906 F.2d 742 (D.C. Cir. 1990) 22

STATUTES AND RULES

1947 Tex. Gen. Laws 36 11

Sup. Ct. R. 37.2 1

Sup. Ct. R. 37.6 1

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Application for Writ of Mandamus, *Sweatt v. Painter*, No.74,945 (May 16, 1946) 10

Judgment of the Court, *Sweatt v. Painter*,
No. 74,945 (Dec. 17, 1946) 10

Judgment of the Court, *Sweatt v. Painter*,
No. 74,945 (June 17, 1947) 13

Letter from E. J. Mathews to Heman Sweatt
(Mar. 3, 1947) 11

Letter from Theophilus Painter to Heman Sweatt
(Mar. 16, 1946) 7

Letter from Theophilus Painter to Attorney General Grover Sellers (Feb. 26, 1946) 6

Memorandum from Tom Clark, Associate Justice, Supreme Court of the United States, to Supreme Court Justices (Apr. 1950) 16

Op. Att'y Gen. Tex. No. O-7126 (May 16, 1946) . . 6, 7

Transcript of Record, Harrison Direct Testimony, *Sweatt v. Painter*, No. 74,945 (May 15, 1947) 12, 13

Transcript of Record, Pt. 1, *Sweatt v. Painter*, No. 74,945 (May 12-13, 1947) 12

TEXAS SCHOOL DEMOGRAPHIC DATA

DALLAS INDEP. SCH. DIST., ENROLLMENT STATISTICS (AS OF 10/24/2015), https://mydata.dallasisd.org/SL/SD/ENROLLMENT/Enrollment.jsp?SLN=1000 26

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OTHER AUTHORITIES

Matthew Adams, *University Removes Davis Statute from Main Mall*, THE DAILY TEXAN, Aug. 30, 2015 34

Peter Applebome, *Texas Is Told to Keep Affirmative Action in Universities or Risk Losing Federal Aid*, N.Y. TIMES, Mar. 26, 1997 23

JACK BASS, UNLIKELY HEROES: A VIVID ACCOUNT OF THE IMPLEMENTATION OF THE *BROWN* DECISION IN THE SOUTH BY SOUTHERN FEDERAL JUDGES COMMITTED TO THE RULE OF LAW (1990). 21

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Heman Sweatt's Victory, LIFE, Oct. 16, 1950 17

DARLENE CLARK HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY (1979) 9

GARY M. LAVERGNE, BEFORE BROWN: HEMAN MARION SWEATT, THURGOOD MARSHALL, AND THE LONG ROAD TO JUSTICE (2010) ..... *passim*

Margaret Mayer, *Counsels Argue Equality Clause In Sweatt Case*, AUSTIN AMERICAN, Jan. 30, 1948 14

GARY ORFIELD AND CHUNGMEI LEE, BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE (2004) 25

GARY ORFIELD, JOHN KUSCERA & GENEVIEVE SIEGEL-HAWLEY, *E PLURIBUS*...SEPARATION: A DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS (2012) 24, 25

SCHOOL DESEGREGATION IN TEXAS: THE IMPLEMENTATION OF UNITED STATES VS. STATE OF TEXAS (Policy Research Report 51, Lyndon B. Johnson School of Public Affairs 1982) 20

AMILCAR SHABAZZ, ADVANCING DEMOCRACY: AFRICAN AMERICANS AND THE STRUGGLE FOR ACCESS AND EQUITY IN HIGHER EDUCATION IN TEXAS (2004) 22

The Great Debaters (2007) 9

The University of Texas at Austin, Heman Sweatt Endowed Presidential Scholarship in Law . 18, 19

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Katherine Leal Unmuth, *University of Texas Trails State Demographics with Minority, Low-Income Students*, DALLAS MORNING NEWS, Jan. 13, 2010 23

INTEREST OF *AMICUS CURIAE*[1]

Amici curiae are the daughter and nephews of Heman Marion Sweatt, who was denied admission to The University of Texas Law School for one reason: "the fact that he is a negro." Texas law forbade UT from considering any of his other qualities: not his intelligence, not his determination, not the grit he gained living under and fighting Jim Crow.

In 1950 – four years before *Brown v. Board of Education* – this Court held that Sweatt must be admitted to UT, because the separate law school created to accommodate him was not equal in (among other things) intangibles such as reputation, and because Sweatt would be "removed from the interplay of ideas and the exchange of views" with "members of the racial groups which number 85% of the population of the State."

Today, UT honors the legacy of Heman Sweatt in many ways, none more important than its commitment to creating a genuinely diverse student body. It does so through an admissions policy that considers (to the extent allowed by the Texas Top Ten Percent Law,

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[1] Pursuant to Supreme Court Rule 37.6 of the Rules of this Court, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that counsel of record for both petitioners and respondent were timely notified of the intent to file this brief; the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

which depends on secondary-school segregation to increase minority enrollment) all aspects of an applicant's character – including, in part, how that character has been shaped by race.

The Sweatt Family submits this brief to recount Heman Sweatt's story in the context of Texas's long and continuing history of segregation in education and to support UT's use of a holistic admissions policy as a narrowly tailored means of fulfilling its mission to prepare students to engage and lead Texas's diverse society.

INTRODUCTION AND SUMMARY OF ARGUMENT

Hemella Sweatt-Duplechan, M.D. is a dermatological pathologist. Her oldest child, now 16, is serious about soccer, but more so about his studies. In his Cincinnati school, selected for its diversity as well as academic excellence, he achieved the highest GPA four years running. He scored second among seventh graders in the country on the National Spanish Test. He is understandably a source of pride for the Sweatt Family, which is serious about education. Historically serious.

Dr. Sweatt-Duplechan's father was Heman Marion Sweatt, who fought to attend The University of Texas Law School, which was refused for the sole reason that he was black. Sweatt's legal battle, led by Thurgood Marshall, culminated in this Court's ruling for the first time that an African American must be admitted to an all-white school.

The lessons from Heman Sweatt's struggle and from this Court's opinion in *Sweatt v. Painter*[2] resound in the issues once again before the Court.

In *Sweatt*, this Court first recognized that in higher education the interplay of ideas and exchange of views among students are critical. It was in *Sweatt* – not *Bakke*[3] – that the Court first found that diversity, including racial diversity, was a compelling component of effective higher education. The Court's discussion of diversity in *Sweatt* would echo more than a half-century later in *Grutter*.[4] The Court ultimately held in *Sweatt* that the separate school Texas cobbled together was unequal to UT Law School, in part because it could not provide the diversity critical to a first-class legal education.

Sweatt's story is but one chapter in Texas's long history of segregation in the education of its black and Hispanic citizens. That history, sadly, is turning back on itself. After years of steady integration (frequently under the firm hand of heroic federal judges), Texas schools are *de facto* resegregating. Each year, more black and Hispanic students attend highly segregated schools, where less than 10% of the enrollment comprises other races. Against this backdrop, UT faces its mission to train students to engage and lead Texas's increasingly diverse society.

Texas law compelled UT to view Sweatt in one determinative dimension: his race. He deserved more.

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[2] 339 U.S. 629 (1950).

[3] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

[4] *Grutter v. Bollinger*, 539 U.S. 306 (2005).

He deserved consideration of his whole, individual being: his strengths, his weaknesses, his talents, his character, his life experiences – including how they were shaped by his race.

Today, UT's admissions policy affords applicants falling outside the Top Ten Percent Law the holistic consideration Heman Sweatt was denied. UT reviews their individual strengths, weaknesses, talents, character, and – in a small, unquantified part – how their unique life experiences have been affected by race. UT neither admits nor excludes any applicant just because of race. Fisher argues that UT's consideration of race as part of a holistic review results in fewer minority admissions than the Top Ten Percent Law, under which ten percent of graduates from highly segregated schools are automatically admitted. But that misses the point. The purpose of UT's holistic review is not to admit more minority students without regard to who they are as individuals. UT seeks to supplement its Top Ten Percent admissions with those individuals – be they black, white, Hispanic, Asian, Native American, or other – who will best contribute to a robust exchange of ideas and exposure to different views and life experiences.

Controversial events since *Fisher I* – from Ferguson and Charleston to raising the Rainbow Banner and striking the Stars and Bars – underscore how classroom and campus-wide discussion can be enriched by a true diversity of backgrounds *within* racial and ethnic groups. UT recently removed the statue of Jefferson Davis from the Main Mall. Consider how a debate over that decision would be enlivened by the views of the popular African-American quarterback for

the Rebels of Jack C. Hays High School or the proud descendant of a Confederate veteran who attended predominantly African-American Jack Yates High. Sweeping in the top ten percent of highly segregated schools captures none of these nuances; they can be appreciated only through holistic review of an applicant's whole file.

Heman Sweatt's legacy lives on at UT and in Austin. Symposia, scholarships, a courthouse, and a side of UT's campus bear his name. But it is UT's commitment to creating a genuinely diverse student body – one based on a holistic review of applicants' unique history and persona, not just their race – that best honors Heman Marion Sweatt.

ARGUMENT

I. *SWEATT V. PAINTER*

A. Sweatt's Application and Painter's Response

Room 1 of the Main Building, contiguous with the iconic University of Texas Tower, houses UT's Office of the Registrar. There, on February 26, 1946, Heman Marion Sweatt, an African-American letter carrier from Houston, handed UT President Theophilus S. Painter a copy of his college transcript and asked to be admitted to study law. Painter said he would ask the attorney general how UT should respond.[5]

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[5] *See generally* GARY M. LAVERGNE, BEFORE BROWN: HEMAN MARION SWEATT, THURGOOD MARSHALL, AND THE LONG ROAD TO JUSTICE 97-103 (2010) [hereinafter BEFORE BROWN].

Painter presented the facts simply and starkly:

> This applicant is a citizen of Texas and duly qualified for admission to the Law School at the University of Texas, save and except for the fact that he is a negro.[6]

On March 16, Attorney General Grover Sellers released Opinion O-7126, "Re: Whether a person of negro ancestry, otherwise qualified for admission into the University of Texas, may be legally admitted to that institution."[7] He began his analysis:

> The wise and long-continued policy of segregation of the races in educational institutions of this State has prevailed since the abolition of slavery, and such policy is found incorporated not only in the Constitution of the State of Texas but also in numerous related statutes.[8]

He confirmed that the constitutionality of segregation had been repeatedly sustained by this Court, particularly in *Plessy v. Ferguson*,[9] but added:

> there is no doubt that if equal educational advantages are not provided for the applicant

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[6] Letter from Theophilus Painter to Attorney General Grover Sellers (Feb. 26, 1946), *quoted in* BEFORE BROWN at 104.

[7] Op. Att'y Gen. Tex. No. O-7126 (Mar. 16, 1946), *available at* https://www.oag.state.tx.us/opinions/opinions/39sellers/op/1946/pdf/gs7126.pdf.

[8] *Id.* at 2 (citations omitted).

[9] 163 U.S. 537 (1896).

> within the State, he must be admitted to the law school of the University of Texas.[10]

He noted that the Legislature had authorized Prairie View State Normal and Industrial College (which it renamed Prairie View University) to teach any graduate- or professional-level course UT offered to whites.[11] He concluded:

> [T]he segregation of races in educational institutions in Texas may not be abrogated unless and until the applicant in good faith makes a demand for legal training at Prairie View University, gives the authorities reasonable notice, and is unlawfully refused.[12]

The next day, Painter sent Sweatt a copy of the Attorney General's opinion, concluding: "in accordance therewith it becomes necessary at this time to finally refuse your application to the Law School at the University of Texas."[13]

B. Sweatt's Many Dimensions

Sweatt was denied admission to UT because of one determinative dimension: his race. Although Painter conceded Sweatt was otherwise "duly qualified," under Texas law, UT could not consider any of Sweatt's individual qualities and characteristics. It could not

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[10] Op. Att'y Gen. Tex. No. O-7126, *supra* n.7, at 2.

[11] *Id.* at 3.

[12] *Id.*

[13] Letter from Theophilus Painter to Heman Sweatt (Mar. 16, 1946), *quoted in* BEFORE BROWN at 109.

undertake a holistic review to put Sweatt's race in context with his unique life experiences.

If UT could have looked beyond "the fact that he is a negro," it would have learned that Sweatt grew up in a predominately white Houston neighborhood,[14] yet was forced to attend schools set aside for "colored" children. UT would have learned that education was deeply important to the Sweatt family.

Heman's father was James Leonard Sweatt, Sr. The son of a slave, James was one of the first graduates of Prairie View State Normal School and Industrial College, then the only state-supported institution of higher education for African Americans in Texas.[15] He had been a teacher and principal in Beaumont, but Texas's poor pay for black educators led him to move to Houston, where he worked as a postal clerk. Nevertheless, he saw to it that each of his seven children who reached adulthood not only completed college, but earned advanced degrees.[16]

Heman ("Bill" to those who knew him) graduated from Jack Yates High School in Houston and Wiley College in Marshall, Texas, where he majored in biology. His teachers included Melvin Tolson, the legendary African-American writer and rhetorician, who in 1934 coached Wiley's debate team to a stunning

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[14] According to the 1918 *Houston City Directory*, only 24% of the households surrounding the Sweatts' home on Chenevert Street were "colored." BEFORE BROWN at 12, 297 n.21.

[15] Prairie View was created in 1876 as a "separate-but-equal" institution to enable Texas to accept federal Morrill Act funds to establish Texas A&M. *See* BEFORE BROWN at 130-31.

[16] *Id.* at 9-11.

victory over national champion University of Southern California.[17]

Like his father, Heman became a teacher and substitute principal, but left due to the poor pay and facilities plaguing the colored schools in Cleburne, as in the rest of Texas. In 1937, he enrolled in the University of Michigan and maintained a B+ average in a pre-med curriculum. But Sweatt, in fragile health, found the northern winter too harsh and did not return after his first year. Having already passed the civil service exam, he took a job with the Post Office in Houston, and two years later he married his high-school sweetheart.[18]

In the 1940s, Sweatt began a fight against racial discrimination he would pursue for the rest of his life. He walked door-to-door asking for donations to finance lawsuits challenging Texas's whites-only primaries.[19] He saw that white postmasters would not promote blacks to "indoor" positions. In 1944, with the help of an attorney, Sweatt filed a grievance charging the Post Office with violating its own regulations.[20] From that experience grew his desire to study law and to use the law to combat discrimination.[21]

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[17] *Id.* at 16-17. Tolson was portrayed by Denzel Washington in *The Great Debaters* (2007).

[18] *Id.* at 18-19, 70.

[19] *Id.* at 61; *see also* DARLENE CLARK HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY (1979).

[20] *Id.* at 70-71.

[21] *Id.*; *see also id.* at 137.

And in 1946, Heman Marion Sweatt was ready to battle UT and the State of Texas.

C. Sweatt's Suit and the "Basement School"

On May 16, 1946, Sweatt filed his landmark case in the 126th Judicial District Court of Travis County. He was represented by William Durham of Dallas, together with Thurgood Marshall of the NAACP Legal Defense Fund in New York.[22]

In reaction, the Texas A&M Regents passed a resolution that black applicants who otherwise qualified to attend UT Law School would instead be taught at Prairie View University by "qualified Negro attorneys."[23] On December 17, Judge Roy Archer denied Sweatt's Petition for Writ of Mandamus, finding that the legal training to be offered at Prairie View was "substantially equivalent to that offered at the University of Texas."[24] On February 1, 1947, the law school officially opened, but no one applied for admission.[25]

While Sweatt appealed, the Texas Legislature worked to establish an "entirely separate and equivalent university of the first class for negroes" to be

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[22] Application for Writ of Mandamus, *Sweatt v. Painter*, No.74,945 (May 16, 1946) *available at* http://www.houseofrussell.com/legalhistory/sweatt/docs/svppldng.htm.

[23] BEFORE BROWN at 131-32.

[24] Judgment of the Court, *Sweatt v. Painter*, No. 74,945 (Dec. 17, 1946), *available at* http://www.houseofrussell.com/legalhistory/sweatt/docs/svppldng.htm.

[25] BEFORE BROWN at 141-43.

located in Houston.[26] To address Sweatt's suit, the bill authorized a temporary law school in Austin.[27] On March 3, UT's Registrar – appointed to serve as registrar for the Texas State University for Negroes – wrote Sweatt:

> I am pleased to advise that your qualifications heretofore established and your application heretofore made will entitle you to attend the new school now being opened at 104 East 13th Street, Austin, Texas.[28]

Neither Sweatt nor anyone else registered for the three classes offered by the makeshift law school, which closed after a week.[29]

The temporary school of law was to occupy part of a three-story building just 100 yards from the State Capitol. Entering the rooms leased for the law school required stepping down two or three steps from the sidewalk to an area shaded by a gallery. At the trial to determine whether the separate school was equal to UT, and in the contemporaneous media campaign and in legend ever after, it would be derided as "The Basement School."[30]

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[26] 1947 Tex. Gen. Laws 36.

[27] *Id.* at 39-40.

[28] Letter from E. J. Mathews to Heman Sweatt (Mar. 3, 1947), *quoted in* BEFORE BROWN at 147-46.

[29] BEFORE BROWN at 150-51.

[30] *Id.* at 148-49.

D. The Trial of Intangibles and the Interplay of Ideas

The trial of *Sweatt v. Painter* and subsequent appeals were not really about whether the separate law school was in a basement or whether its physical facilities equaled UT's. To be sure, the trial record is replete with metrics such as square footage and the number of faculty, course offerings, and books available.[31] But Marshall shifted the focus to intangibles – what this Court would describe as "those qualities which are incapable of objective measurement but which make for greatness in a law school."[32]

Particularly relevant to *Fisher*, Dean Earl Harrison of the University of Pennsylvania Law School testified that in the "modern system of instruction," the professor does not lecture so much as direct a discussion among the students:

> it is largely a matter of discussion in which the members of the class participate to a large extent, one commenting on the recital made by the previous; another criticizing his statement, either the facts of the case or the decision arrived at by the Court, and it is first and foremost a class discussion.[33]

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[31] Transcript of Record, Pt. 1, *Sweatt v. Painter*, No. 74,945 (May 12-13, 1947), *available at* http://www.houseofrussell.com/legalhistory/sweatt/docs/svptr1.htm#statements; *see generally* BEFORE BROWN at 155-59, 163-65.

[32] *Sweatt*, 339 U.S. at 634.

[33] Transcript of Record, Harrison Direct Testimony, *Sweatt v. Painter*, No. 74,945 (May 15, 1947), *available at*

The larger and more diverse the student body, Dean Harrison emphasized, the more powerful the teaching tool.[34]

As expected, on June 17, 1947, Judge Archer again denied Sweatt's petition, finding the temporary law school "substantially equal" with UT Law School.[35] But allowing Marshall, frequently over objection, to put on "sociological" evidence of intangibles, he created the record underlying this Court's opinion three years later.

Equally expected, the Third Court of Civil Appeals affirmed and the Texas Supreme Court denied further review.[36] In oral argument before the Austin appellate panel, Marshall attacked the isolation from other racial groups that marked the "basement education" Texas offered Sweatt:

> The modern law school is operated so the student can understand ideas of all stratas *[sic]* of society, so he can go out and be of service to his community, his state and his nation. . . . You tell [Sweatt], "You go over there by yourself. You

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http://www.houseofrussell.com/legalhistory/sweatt/docs/svptr3.htm-#directharrison, *quoted in* BEFORE BROWN at 194-95.

[34] *Id.*, *quoted in* BEFORE BROWN at 195-96.

[35] Judgment of the Court, *Sweatt v. Painter*, No. 74,945 (June 17, 1947), *available at* http://www.houseofrussell.com/legalhistory/sweatt/docs/svppldng.htm#judgmentdistct646.

[36] *Sweatt v. Painter*, 210 S.W. 442 (Tex. Civ. App–Austin 1947, writ ref'd).

> don't have a chance to exchange ideas with anybody."[37]

E. This Court's Opinions of June 5, 1950

On June 5, 1950, Chief Justice Vinson announced the unanimous decisions in *Sweatt v. Painter*[38] and *McLaurin v. Oklahoma State Regents for Higher Education*.[39]

In *Sweatt*, the Court concluded it "cannot find substantial equality in the educational opportunities offered white and Negro law students by the State."[40]

> In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior.[41]

But the Court continued on to intangibles – and began the end of *de jure* segregated education in America: "What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective

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[37] Margaret Mayer, *Counsels Argue Equality Clause In Sweatt Case*, AUSTIN AMERICAN, Jan. 30, 1948, *quoted in* BEFORE BROWN at 231.

[38] 339 U.S. 629 (1950).

[39] 339 U.S. 637 (1950).

[40] 339 U.S. at 633.

[41] *Id.* at 633-34.

measurement, but which make for greatness in a law school."[42]

> Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of alumni, standing in the community, traditions and prestige.[43]

The Court emphasized that legal education "cannot be effective in isolation from the individuals and institutions with which the law interacts"; it "cannot be removed from the interplay of ideas and exchange of views with which the law is concerned."[44]

The Court expounded that the law school to which Texas was willing to admit Sweatt "excludes from its student body members of the racial groups which number 85% of the population of the State" including those "with whom [he] will inevitably be dealing" when he becomes a lawyer.[45]

Justice Tom Clark, a UT Law School alumnus, had previously addressed these issues in a bench memorandum. He steered the other Justices away from counting bricks and books to considering what cannot be quantified. He concluded that the law school Texas offered Sweatt was not equal to his alma mater for many reasons, including that UT –

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[42] *Id.* at 634.

[43] *Id.*

[44] *Id.*

[45] *Id.*

> attracts a cross section of the entire State in its student body—affords a wider exchange of ideas—and, in the combat of ideas, furnishes a greater variety of minds, backgrounds and opinions . . . .[46]

The Chief Justice, writing for a unanimous Court, echoed:

> With such a substantial and significant segment of society excluded, we cannot conclude that the education offered [Sweatt] is substantially equal to that which he would receive if admitted to the University of Texas Law School.[47]

The Court followed *Sweatt* with a unanimous opinion in *McLaurin*, which also underscored the importance in education of the exchange of ideas and interaction with different segments of society. The University of Oklahoma admitted George McLaurin to its graduate school of education and allowed him to attend the same classes and use the same facilities as other students, but physically isolated him in the classrooms, library, and cafeteria. The Chief Justice wrote that as a result of the restrictions, meant to preserve some semblance of segregation, McLaurin was "handicapped in his pursuit of effective graduate instruction."[48] In particular, "[s]uch restrictions impair and inhibit his ability . . . to engage in discussions and

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[46] Memorandum from Tom Clark, Associate Justice, Supreme Court of the United States, to Supreme Court Justices (Apr. 1950), *available at* http://www.law.du.edu/russell/lh/sweatt/docs/-clarkmemo.htm, *quoted in* BEFORE BROWN at 249-50.

[47] *McLaurin*, 339 U.S. at 634.

[48] *Id.* at 641.

exchange views with other students . . . ."[49] The Court added that isolation from other racial groups impeded the public interest to prepare leaders for an "increasingly complex" society.[50]

II. SWEATT'S LIFE AND LEGACY AFTER *SWEATT V. PAINTER*

A. Sweatt at UT

On September 19, 1950, Heman Sweatt stood in line with five other African Americans and "scores of white boys" to enroll in UT Law School.[51] He would not graduate. While accounts of Sweatt's harassment in law school are inconsistent, the pressure of the long litigation took its toll on his health.[52] His first year at UT Law School (from which an estimated 50% of all students flunked out in the 1950s) was marked by illness compounded by a failing marriage.[53] Sweatt left in 1951 before completing his second year.[54]

B. Sweatt at the Urban League

In 1952, Sweatt accepted a scholarship to attend the School of Social Work at Atlanta University. In 1954 he earned a master's degree and went to work for the

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[49] *Id.*

[50] *Id.*

[51] *Heman Sweatt's Victory*, LIFE, Oct. 16, 1950, at 64, *quoted in* BEFORE BROWN at 264.

[52] BEFORE BROWN at 274-78.

[53] *Id.* at 279-81. Sweatt recalled that his wife left him the night before his first exam. *Id.*

[54] *Id.* at 281.

Urban League, becoming the Assistant Regional Director responsible for organizing new chapters. During his 23-year service, the number of affiliates tripled.[55]

At an Urban League picnic, Sweatt met Katherine Gaffney, whom he married in 1963. She gave birth to a daughter they named Hemella, but called Mellie, and who today is addressed professionally as Dr. Sweatt-Duplechan.[56]

On October 3, 1982, Heman Marion Sweatt died.[57]

C. Sweatt's Legacy

In Houston, the Texas State University for Negroes was renamed Texas Southern University, and today it is the second-largest predominantly African-American school in the United States. Informally, it is known as "The House That Sweatt Built," and its law school is formally named for his lawyer and champion, Justice Thurgood Marshall.[58]

In Austin, Sweatt is now a symbol of the equal justice and inclusiveness to which the city and UT aspire. UT Law School created a professorship and scholarship in his name.[59] In 1987, UT held the first

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[55] *Id.* at 281.

[56] *Id.*

[57] *Id.* at 283.

[58] *See generally* Marguerite L. Butler, *The History of Texas Southern University, Thurgood Marshall School of Law: "The House That Sweatt Built,"* 23 T. MARSHALL L. REV. 45 (1997).

[59] The University of Texas at Austin, Heman Sweatt Endowed Presidential Scholarship in Law, http://endowments.giving.utexas.

Heman Marion Sweatt Symposium on Civil Rights, an annual event still hosted by the University's Division of Diversity and Community Engagement. That same year, UT renamed the southeast side of campus the Heman Sweatt Campus.[60] And in 2005, the Travis County Courthouse where *Sweatt v. Painter* was tried was renamed the Heman Marion Sweatt Courthouse.[61]

Sweatt's legacy in Texas education extends to his nephews who, with his daughter Dr. Sweatt-Duplechan, submit this brief as *amici*.

Heman Marion Sweatt II is a UT graduate who spent his career with AT&T and participated in the first symposium honoring his uncle.

James Leonard Sweatt III, M.D., a former member of the Texas State University System Board of Regents, is himself a pioneer. A board-certified thoracic surgeon, he was the first African American admitted to the Washington University School of Medicine. In 1995, he became the first African-American President of the Dallas County Medical Society.

But Heman Marion Sweatt's greatest legacy lives on in the more than ten thousand young men and women who each year graduate from UT, having benefited

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edu/page/sweatt-heman-eps-law/2343/ (last visited Oct. 23, 2015); Richard Allen Burns, *Sweatt, Heman Marion*, THE HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/fsw23 (as visited Oct. 23, 2015).

[60] Burns, *supra* n.59.

[61] Travis County Archives, *The Travis County Courthouse*, http://traviscountyhistory.org/index.php/a-history-of-travis-county/the-courthouse (as visited Oct. 23, 2015).

from the "interplay of ideas" and "exchange of views" with individuals of different backgrounds, which flow from UT's commitment to create and cultivate a genuinely diverse student body.

III. SEGREGATION IN TEXAS EDUCATION

Sweatt v. Painter did not immediately end segregation of Texas schools. Nor did *Brown v. Board of Education*.[62] We turn to the history of desegregation of Texas public schools and, sadly, their recent resegregation.

A. A Brief History of Discrimination in Texas Education[63]

"Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute."[64] Discrimination in Texas has been nowhere more pervasive than in public education.[65] "The history of official discrimination in primary and secondary education in Texas is well

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[62] *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

[63] More detail is in *Hopwood v. Texas*, 861 F. Supp. 551, 554-63 (W.D.Tex. 1994) (hereinafter *Hopwood I*), *rev'd*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) and SCHOOL DESEGREGATION IN TEXAS: THE IMPLEMENTATION OF UNITED STATES VS. STATE OF TEXAS (Policy Research Report 51, Lyndon B. Johnson School of Public Affairs 1982).

[64] *LULAC v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993); *see id.* at 915 (King, J., dissenting).

[65] *Hopwood I*, 861 F. Supp. at 554-57.

documented in history books, case law, and the record of the trial" in *Hopwood v. Texas*.[66]

Even through the 1980s, most Texas students lived in school districts that courts and the United States Department of Justice had determined were still unconstitutionally segregated.[67] Over 70% of blacks in Texas lived in metropolitan areas operating under court-ordered desegregation plans.[68] School districts were found to have practiced official discrimination against Mexican-American as well as African-American students.[69] Dallas public schools "opposed any student desegregation, no matter how feasible or how minimal,"[70] and Fort Worth still was not unitary.[71] Although Houston has been declared unitary, "70% of the black students in HISD still attend[ed] schools that [we]re 90% minority, including as minorities black and Hispanic students."[72]

For over thirty-five years the federal government has required that Texas take affirmative, race-conscious measures to ensure that the effects of past *de*

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[66] *Id.* at 554. *See generally* JACK BASS, UNLIKELY HEROES: A VIVID ACCOUNT OF THE IMPLEMENTATION OF THE *BROWN* DECISION IN THE SOUTH BY SOUTHERN FEDERAL JUDGES COMMITTED TO THE RULE OF LAW (1990).

[67] *Hopwood I*, 861 F. Supp. at 554.

[68] *Id.*

[69] *Id.* at 554, 572-73.

[70] *Tasby v. Wright*, 713 F.2d 90, 93 (5th Cir. 1983).

[71] *Flax v. Potts*, 567 F. Supp. 859, 861 (N.D. Tex. 1983).

[72] *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 226-27 (5th Cir. 1983).

jure discrimination are eliminated in its higher education institutions. In 1977, the court in the *Adams* litigation ordered the Office for Civil Rights ("OCR") of the United States Department of Education ("DOE") to investigate discrimination in Texas's system of higher education.[73] OCR found that Texas failed to eliminate the vestiges of its segregated higher education system and was in violation of Title VI of the Civil Rights Act of 1964.[74]

Texas submitted a series of desegregation plans, which OCR repeatedly found insufficient. The *Adams* court found that "Texas has still not committed itself to the elements of a desegregation plan which in [DOE's] judgment complies with Title VI" and ordered enforcement proceedings to begin unless Texas submitted a fully conforming plan. OCR ultimately accepted a revised Texas Plan that included a commitment to significantly increase the number of black and Hispanic students.[75]

By the late 1980s, it became clear that the Texas Plan was not working, and through the 1990s, OCR continued to oversee Texas's desegregation efforts,

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[73] *Id.* at 555. *See Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973). The *Adams* litigation was eventually dismissed *sub nom. Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990). *See generally*, AMILCAR SHABAZZ, ADVANCING DEMOCRACY: AFRICAN AMERICANS AND THE STRUGGLE FOR ACCESS AND EQUITY IN HIGHER EDUCATION IN TEXAS (2004).

[74] *Hopwood I*, 861 F Supp. at 556.

[75] *Id.*

reevaluating them in light of *United States v. Fordice*.[76] Despite the Fifth Circuit's 1996 ruling in *Hopwood* that forbade race-based criteria in admissions decisions,[77] OCR insisted that Texas continue its affirmative action efforts, threatening to cut off funding if the State followed the ruling.[78] To this day, the State of Texas remains subject to a higher education desegregation plan, and OCR continues to oversee Texas's ongoing efforts to eliminate the vestiges of segregation.

Moreover, despite substantial outreach efforts, UT today finds it hard to overcome its reputation as a "white" institution that does not provide a welcoming environment for underrepresented minority students.[79] *Amicus* Heman Sweatt II still recalls the excitement he felt seeing another black student on the UT campus. It was a rare sighting.[80]

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[76] 505 U.S. 717 (1992); *see Hopwood I*, 861 F. Supp. at 557.

[77] *Hopwood v. Texas*, 78 F.3d 932, 935-38 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

[78] *See* Peter Applebome, *Texas Is Told to Keep Affirmative Action in Universities or Risk Losing Federal Aid*, N.Y. TIMES, Mar. 26, 1997, at B4.

[79] SJA 14a.

[80] *See generally* Katherine Leal Unmuth, *University of Texas Trails State Demographics with Minority, Low-Income Students*, DALLAS MORNING NEWS, Jan. 13, 2010, *available at* http://www.dallasnews.com/news/education/headlines/20100113-University-of-Texas-trails-state-demographics-6891.ece.

B. Resegregation of Texas Public Schools

Since the 1990s, Texas elementary and secondary schools have resegregated, particularly in urban areas.[81]

In 2009-10, four out of ten black students in Texas attended a school that was "highly segregated" – defined as having 90-100% minority enrollment. 82.4% attended schools with 50-100% minority enrollment. The typical black student would see a white face in only a quarter of her schoolmates.[82]

The statistics for Hispanics are worse. In 2009-10, over half of Hispanic students in Texas attended schools that were 90-100% minority. 87.4% attended schools with 50-100% minority enrollment. And the typical Hispanic student attended a school with only 18.9% whites.[83]

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[81] In an extensive dissent, Justice Breyer described and documented "the growing resegregation of public schools" nationwide. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803 (2007); *id.* at 805-06, App. A. Three members of the Court joined Justice Breyer, and none questioned the fact that *de facto* segregation had returned.

[82] GARY ORFIELD, JOHN KUSCERA & GENEVIEVE SIEGEL-HAWLEY, *E PLURIBUS*...SEPARATION: A DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS (2012) at 46, Table 18, *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_complete_2012.pdf.

[83] *Id.* at 50, Table 21.

The trend since 1990 is troubling.

School Year[84]	1991-92	2000-01	2009-10
% Blacks in 90-100% Minority Schools	34.9	37.3	39.9
% White in School of Typical Black	35.2	28.1	24.6
% Hispanics in 90-100% Minority Schools	41.8	47.8	52.7
% White in School of Typical Hispanic	25.8	21.9	18.9

In 2000-01, 42% of the students in Texas public schools were white. By 2010-11, that figure dropped to 31.2%.[85] Further reflecting and projecting this trend, 2010-11 white enrollment in public schools dropped steadily by grade: 36.4% in twelfth grade, 29.5% in first grade, and 15.6% in pre-kindergarten.[86]

Public schools in Texas's major cities are even more highly segregated.

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[84] *Id.* 1991-92 and 2000-01 statistics in part previously published in GARY ORFIELD AND CHUNGMEI LEE, BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE (2004).

[85] TEX. EDUC. AGENCY, ENROLLMENT IN TEXAS PUBLIC SCHOOLS 2010-11 8 (2011), http://www.tea.state.tx.us/acctres/Enroll_2010-11.pdf.

[86] *Id.* at 19.

In 2011-12, only 8.1% of all students in the 279-school Houston Independent School District were white.[87] That year at Jack Yates High School, from which Heman Sweatt graduated, only 6 of the 1,179 students – or 0.5% – were white, while 91.7% were African American.[88]

In 2015, only 4.8% of the students in the Dallas Independent School District were white.[89] But at Highland Park High School only 4.3% of the student body was African American.[90]

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[87] HOUSTON INDEP. SCH. DIST., 2011-2012 FACTS AND FIGURES 1 (2012), https://www.houstonisd.org/HISDConnectEnglish/Images/PDF/HISDFactsFigures2012Final.pdf.

[88] TEX. EDUC. AGENCY, ACADEMIC EXCELLENCE INDICATOR SYSTEM, 2010-11 CAMPUS PERFORMANCE REPORT, YATES HIGH SCHOOL, http://ritter.tea.state.tx.us/perfreport/aeis/2011/campus.srch.html (select "Campus Number" under choice #3, enter "101912020" under choice #4, and click "Continue") (as visited Oct. 24, 2015).

[89] DALLAS INDEP. SCH. DIST., ENROLLMENT STATISTICS (AS OF 10/24/2015), https://mydata.dallasisd.org/SL/SD/ENROLLMENT/Enrollment.jsp?SLN=1000.

[90] TEX. EDUC. AGENCY, ACADEMIC EXCELLENCE INDICATOR SYSTEM, 2010-11 CAMPUS PERFORMANCE REPORT, HIGHLAND PARK HIGH SCHOOL, http://ritter.tea.state.tx.us/perfreport/aeis/2011/campus.srch.html (select "Campus Number" under choice #3, enter "188903001" under choice #4, and click "Continue") (as visited Oct. 24, 2015).

In the entire San Antonio Independent School District, only 1.9% of the 2012 enrollment was white.[91] Harlandale High School in 2011 was 98.7% Hispanic.[92]

Outside Texas's largest cities, a quarter of the school districts are more than 77% white.[93]

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[91] SAN ANTONIO INDEP SCH. DIST., FACTS AND FIGURES (2012), http://www.saisd.net/main/index.php?option=com_content&view=article&id=1326:student-demographics&catid=8:about-us-left&Itemid=104 (as visited Aug. 2, 2012).

[92] TEX. EDUC. AGENCY, ACADEMIC EXCELLENCE INDICATOR SYSTEM, 2010-11 CAMPUS PERFORMANCE REPORT, HARLANDALE HIGH SCHOOL, http://ritter.tea.state.tx.us/perfreport/aeis/2011campus.srch.html (select "Campus Number" under choice #3, enter "015904001" under choice #4, and click "Continue") (as visited Oct. 24, 2015).

[93] TEX. EDUC. AGENCY, SNAPSHOT 2011 SUMMARY TABLES DISTRIBUTION STATISTICS (2012), http://ritter.tea.state.tx.us/perfreport/snapshot/2011/distrib.html (as visited Aug. 2, 2012).

Petitioner faults the Fifth Circuit opinion for citing some of these statistics, as well as others on Texas secondary school enrollment and performance, from sources on the Internet. Brief for Petitioner at 18, 22, 33-35. Indeed, Petitioner asserts that "the *only* way to sustain UT's program was [for the court below] to engage in appellate factfinding based on the court's own Internet research," which Petitioner adds is "inexcusable." *Id.* at 22 (emphasis in original). The opinions of this Court regularly rely on data found on Internet websites not otherwise in the formal record. *See, e.g., Horne v. Flores*, 557 U.S. 433, 129 S. Ct. 2579, 2606 n.24 (2009) (citing school enrollment statistics by district from the Arizona Department of Education website); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. –, 135 S. Ct. 2239, 2244 (2015) (citing the Texas Department of Motor Vehicles website regarding specialty license plates); *id.* at 2258 (citing the Buffalo Soldier National Museum website regarding proceeds from specialty license plates); *United States v. Castleman*, 572 U.S. –, 134 S. Ct. 1405, 1408 n.1 (2014) (citing domestic violence statistics

This is not to say that UT is responsible for or that its admissions policies attempt to remediate resegregation of Texas's primary and secondary schools. But it is from this racially isolated school system that UT must fulfill its mission as the State's flagship university to select and train students to engage and lead Texas's "increasingly complex" society. Indeed, many students – of all races – encounter a diverse educational setting for the first time when they arrive at UT for freshman orientation.

IV. THE LESSONS OF *SWEATT V. PAINTER*

A. The Importance of Diversity

The compelling importance of diversity in higher education, first recognized in *Sweatt v. Painter*, has

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from the U.S. Department of Justice Bureau of Justice Statistics website); *id.* at 1413 n.7 (citing population statistics from the U.S. Census Bureau website); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. –, 133 S. Ct. 2517, 2531 (2013) (citing the number of retaliation claims filed from the U.S. Equal Employment Opportunity Commission website); *Begay v. United States*, 553 U.S. 137, 128 S. Ct. 1581, 1584 (2008) (citing statistics regarding alcohol-caused motor vehicle crashes from the National Highway Traffic Safety Administration website); *id.* at 1593 nn.2-4 (Alito, J., dissenting) (citing fatal vehicle crash statistics from the National Highway Traffic Safety Administration website, murder statistics from the Federal Bureau of Investigation website, and arson statistics from the U.S. Fire Administration website); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 845, 848 (2008) (Kennedy, J., dissenting) (citing statistics regarding commodity seizures from the U.S. Customs and Border Protection and the U.S. Government Accountability Office websites and citing statistics regarding prison populations from the Federal Bureau of Prisons website).

Petitioner does not question the accuracy of the Internet data cited in the opinion below.

been repeatedly reaffirmed. The Court's most extensive discussion is found in *Grutter*,[94] which the Court accepted "as given" in remanding this case.[95]

Racial diversity, of course, is important. It allows (indeed requires) students to interact with "members of the racial groups which number [a high percentage] of the population of the State" including those "with whom [they] will inevitably be dealing" when they graduate.[96]

But diversity in higher education is not just about different races. It is about the interplay of different ideas, the exchange of different views, and exposure to different life experiences.[97] As *Grutter* recognized, diversity's

> benefits are important and laudable because the classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.[98]

It follows that to be meaningful, diversity must be examined at two levels of magnification beyond the

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[94] *Grutter v. Bollinger*, 539 U.S. 306 (2005).

[95] *Fisher v. Univ. of Texas at Austin*, 570 U.S. –, 133 S. Ct. 2411, 2417 (2013); *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 710, 722 (Roberts, C. J.) ("[W]e have recognized as compelling ... the interest in diversity in higher education upheld in *Grutter*").

[96] *Sweatt*, 339 U.S. at 634; *see also Grutter*, 539 U.S. at 329-32.

[97] *Sweatt*, 339 U.S. at 634.

[98] *Grutter*, 539 U.S. at 331.

student body as a whole and broad racial classifications. First, for "classroom discussion" to benefit from diversity, there must be diversity in the classroom, not just the campus. College administrators must consider diversity across disciplines, and try to achieve "critical mass," such that minorities feel neither isolated nor responsible to speak for their race or ethnic group.[99] Otherwise, they – *and their white classmates* – lose the lively interplay of ideas and exchange of views that flow from true diversity.

In 2004, while considering whether to include race as part of a holistic review of applicants, UT conducted extensive studies that found (among other things) that in classes with 10 to 24 students, 89% had either one or zero African Americans. Minority students reported feeling isolated, and a majority of *all* students perceived "insufficient minority representation" in classrooms for "the full benefits of diversity to occur."[100]

Second, the academy must consider diversity of backgrounds, life experiences, and viewpoints *within* races – not just broad racial and ethnic groupings. The "white/non-white" dichotomy is simply too "blunt" to ensure meaningfully different life experiences and viewpoints.[101]

As recognized previously in this case, The Texas Top Ten Percent Law is a "blunt" tool to build a diverse

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[99] *Id.* at 329-31.

[100] JA 482a.

[101] *Cf.*, *Parents Involved*, 551 U.S. at 803 (Kennedy, J., concurring).

student body.[102] Passed in reaction to *Hopwood*, it assures automatic acceptance to UT (or any other Texas public college) to the top ten percent of the graduating classes of Jack Yates High School and Harlandale High School, just as it does to Highland Park High School. Viewed only somewhat cynically, its success in increasing minority enrollment at UT depends on the continuing segregation of minorities in Texas secondary schools.

But does it truly produce "the greatest possible variety of backgrounds"? Today's school segregation is not *de jure*, but *de facto* – the result of segregated housing patterns.[103] Unlike Heman Sweatt, children today do not walk past "white" schools to get to their "colored" schools.[104] Because *de facto* school segregation stems from residential patterns, students in the top ten percent of a highly segregated school likely grew up in the same inner-city attendance zone. The top 29 Jack Yates High School graduates live in the same predominantly African-American neighborhood of Houston's Third Ward, probably went to the same elementary and middle schools, had the same teachers, and hung out together watching the same TV shows and listening to the same music. We would expect them to share the views of their schoolmates and neighbors. The same is true for the top 38 graduates of 98%-Hispanic Harlandale High in San Antonio and

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[102] *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 242 (5th Cir. 2011).

[103] *See Parents Involved*, 551 U.S. at 793-95.

[104] BEFORE BROWN at 12-13. Nor do they, as did *Amici*'s Counsel of Record until 1968, walk past "colored" schools to get to their "white" schools.

the overwhelmingly white schools in Highland Park and a quarter of Texas school districts. Sweeping in the top ten percent of highly segregated schools certainly increases minority enrollment at UT, but it hardly guarantees a genuine diversity of life experiences and viewpoints. Moreover, while the benefits of racial diversity in elementary and secondary education may be debated,[106] what is certain is that none flow to the students attending highly segregated schools. Not even the top ten percent.

B. The Importance of the Individual

Seeking to create a student body of truly diverse backgrounds, UT supplements its Top Ten Percent admissions with students selected after evaluation of their entire record of achievements, interests, talents, character, and background. It includes – but is hardly limited to race – which is viewed as but one facet of their unique life experiences. In short, UT affords them the holistic review it denied Heman Sweatt.

In UT's holistic review (consciously modeled on *Grutter*) race is not determinative. No one is admitted because of his race; no one is excluded because of his race. No one is assigned to a particular program based solely upon race. Rather, each individual's "whole range of talents and school needs" are weighed in seeking the benefits of truly diverse classrooms.[106] UT's

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[105] *Compare Parents Involved*, 551 U.S. at 839-42 (Breyer, J., dissenting) (citing studies) *with id.* at 761-63 (Thomas, J., concurring) (citing studies).

[106] *Cf. Parents Involved*, 551 U.S. at 793 (Kennedy, J., concurring) (school district relied upon "mechanical formula" on the basis of "rigid criteria" to make school assignments).

holistic review takes consideration of race far past the "blunt distinction of 'white' and 'non-white'" condemned in *Parents Involved*.[107] It recognizes that diversity means more than a student's skin color or surname.[108] Reviewing the whole file and whole persona, UT admissions officers assess how the interplay of ideas will be furthered by the daughter of Jamaican immigrants living in a mixed-race neighborhood compared with an applicant whose background differs little from the 28 other top graduates of Jack Yates High School. They can consider the likely contribution to be made by the Canadian-born son of a Cuban father and Irish-Italian-American mother, compared with a more typical top-ten-percent graduate of Harlandale High. They can appreciate the student of Indian descent from Highland Park who wants to follow UT alumnus Walter Cronkite into journalism rather than her father into computer science.

Some criticize UT's consideration of race as only part of a holistic review as having "too minimal" an impact on diversity, because fewer minority students are admitted through holistic review than through the Top Ten Percent Law That simply misses the point. Race in the holistic review is but part of the mix intended not just to enroll more persons of a certain race or ethnicity, but to round out a student body with those who will contribute most to genuine diversity in the classroom and on campus. UT seeks to assess in applicants "those qualities which are incapable of

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[107] *See id.* at 786.

[108] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269 (1978) (Powell, J.).

objective measurement but which make for greatness in a" student body.[109]

Controversial events since *Fisher I* – including but hardly limited to Ferguson, Charleston, the rise of the rainbow gay pride banner, and the fall of the Confederate battle flag – underscore how classroom and campus-wide discussion can be enlivened by a true diversity of backgrounds within racial and ethnic groups. Consider the contribution to a debate over UT's decision to remove the statue of Jefferson Davis from its prominent position in front of the Main Building that could be made by: (i) the African-American quarterback for the Rebels of Jack C. Hays High School; (ii) the proud descendant of a Confederate veteran who attended predominantly African-American Jack Yates High; (iii) the Hispanic captain of the Dixie Belles drill team, caught up in the controversy over Richland High's Confederate-themed mascots.[110]

Sweeping in the top ten percent of highly segregated schools captures none of these nuances; they can be appreciated only through holistic review of an applicant's whole file.

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[109] *Sweatt*, 339 U.S. at 634.

[110] *See* Matthew Adams, *University Removes Davis Statute from Main Mall*, THE DAILY TEXAN, Aug. 30, 2015, *available at* http://www.dailytexanonline.com/2015/08/30/university-removes-davis-statue-from-main-mall (as visited Oct. 24, 2015); *cf. Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. –, 135 S. Ct. 2239, 2243-24 (2015) (holding that Texas may decline a proposed specialty license plate featuring the Confederate battle flag).

No one is "stigmatized" with a racial "label" when no one in the pool of applicants afforded holistic review is either given or denied an offer based solely on race. Stigma attaches not when one is recognized as a member of a racial or ethnic group; stigma attaches when one is seen as nothing more. In UT's holistic review, applicants are appreciated for their many dimensions, not just race. This is precisely what Heman Sweatt deserved but was denied.

C. The Importance of Race

Race matters. In the real world, it still matters. "The enduring hope is that race should not matter; the reality is that too often it does."[111]

But in UT's holistic review, race matters only in the context of an applicant's whole life experience and her ability to contribute to the interplay of ideas and exchange of different worldviews. In UT's assessment, an applicant's race can be a plus or it can have no impact whatsoever – for an applicant of *any* race. It all depends on context.

Consider the difference race makes to diversity in the context of these hypothetical applicants from the second decile of their graduating classes:

- John is captain of the track team at Jack Yates High School. It makes a difference whether he is African American or one of the six whites in the school.
- Janet is chair of the Spanish Club at Harlandale High. It makes a difference whether she is Hispanic or one of the twelve African Americans in the school.

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[111] *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring).

- Joseph is president of the senior class at Highland Park High. It makes a difference whether he is white or one of the few Hispanics in the school.

It is naïve in the extreme to think that race does not influence our lives and how we view the world. In UT's holistic review, however, race influences lives and views; it does not define them.

Would that a majority of the Court had joined Justice Harlan's dissent in *Plessy v. Ferguson*,[112] instead of providing the precedent the Texas Attorney General invoked to deny Heman Sweatt's admission to UT. "As an aspiration, Justice Harlan's axiom ['[o]ur Constitution is color-blind'] must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle."[113]

D. The Importance of Patience

The 25-year horizon Justice O'Connor envisioned for race-conscious admissions decisions[114] may have been optimistic, particularly in light of the recent resegregation of this country's elementary and secondary schools. The road to justice may be long, but it really hasn't been that long. Remember the 16-year-old Sweatt-Duplechan honor student in the Introduction? His grandfather was Heman Marion Sweatt. And Heman's grandfather, Richard Sweatt, was a slave.

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[112] 163 U.S. 537 (1896).

[113] *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring).

[114] *Grutter*, 539 U.S. at 343.

CONCLUSION

For these reasons, The Family of Heman Sweatt, *Amicus Curiae*, urges the Court to affirm the judgment below.

Respectfully submitted,

Allan Van Fleet
Counsel of Record
Nicholas Grimmer
McDermott Will & Emery LLP
1000 Louisiana, Suite 3900
Houston, Texas 77002-5005
(713) 653-1703
avanfleet@mwe.com

Counsel for Amicus Curiae
Family of Heman Sweatt
Hemella Sweatt-Duplechan, M.D.
James Leonard Sweatt III, M.D.
Heman Marion Sweatt II

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